IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 44 OF 2003.

Mr. Floyd Coutinho,
r/o 1G, Grass Villa,
H. No. 100,
Socrecotto, Demani,
Cuncolim. ... Appellant.

Versus

1. Mrs. Beatrica Dias,
   Flat No. 3,
   Miguelina Apartments,
   Murida, Agalli,
   Fatorda.
2. State. ... Respondents.

Mr. Arun Bras de Sa, Advocate for the Appellant.

Mr. S.S. Kantak, Advocate for the Respondent No. 1.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No. 2/State.

Coram : P.V. HARDAS, J.

Date : 23rd March 2004.

ORAL JUDGMENT.

The complainant, being aggrieved, by the Judgment, passed by the Judicial Magistrate, First Class, Margao, dated 31st May 2003 in Criminal Case No. 188/OA/NI/2002/I, acquitting the respondent no. 1/accused for an offence punishable under Section 138 of the Negotiable Instruments Act, has filed the present appeal.

2. The facts, in brief, as are necessary for the decision of this appeal are set out hereunder:-

The appellant/complainant filed the aforesaid complaint case before the Judicial Magistrate, First Class, at Margao, alleging therein that the respondent no. 1/accused had requested the complainant for a loan of Rs. 1,65,000/-. The complainant, in view of the good relations and in view of the urgent need of the accused, advanced a hand loan without interest of Rs. 1,65,000/-. The accused towards part re-payment of the loan issued cheque bearing No. 768312, dated 6th February 2002, drawn on the Bank of India, Margao Branch, for Rs. 1,02,400/-. On presentation of the said cheque by the complainant, the cheque was returned unpaid on account of insufficient funds. Despite receipt of the notice, dated 19th February 2002, the accused failed to make the payment and, therefore, the complaint under Section 138 of the Negotiable Instruments Act. The learned trial Magistrate, after recording the verification statement, issued process against the accused.

3. The substance of the accusation was explained to the accused vide Exhibit 7. The accused pleaded not guilty and claimed to be tried. The complainant in support of his case examined 3 witnesses while the accused examined herself as D.W.1. The learned trial Magistrate, for the reasons set out in the Judgment, acquitted the respondent no. 1/accused and, hence, this

appeal, at the behest of the original complainant, assailing the Judgment of acquittal.

4. Mr. Arun Bras De Sa, the learned counsel appearing for the appellant, has urged that the learned trial Court has erred in law in not raising the presumption under Section 139 of the Negotiable Instruments Act against the accused. It is urged by the learned counsel for the appellant that once the presumption is drawn, it is for the accused to rebut the said presumption by leading evidence, which is reliable and cogent. The learned counsel for the appellant has further urged that the explanation of the accused, which is wholly inconsistent with the case made out in the cross-examination, is not sufficient for rebutting the presumption.

5. Mr. Kantak, the learned counsel appearing on behalf of the respondent no. 1/accused, has submitted that the admissions of the complainant in the cross-examination coupled with the evidence of the accused is sufficient for rebutting the presumption. Mr. Kantak has further urged that in an appeal against acquittal the High Court would not interfere merely because a second view was possible, unless it was demonstrated that the view taken by the learned trial Court was wholly a perverse view – a view not possible

to be taken on the basis of the evidence on record. According to Mr. Kantak, if the appellant fails in pointing out perversity in the reasoning of the learned trial Court, the High Court in appeal against acquittal would not interfere.

6. In order to appreciate and evaluate the submissions of the learned counsel for the parties, it is useful to make a reference to the evidence of the complainant and the accused.

7. P.W.1 Floyd Coutinho states that the accused had approached him with a request for loan of Rs. 1,65,000/- for investing in the business. He states that he gave the said amount on 20th august 2001 at his residence. The accused had agreed to repay the said amount, without interest, within a period of four months. On berating the accused for payment, the accused had issued a cheque bearing No. 768312, dated 6th February 2002, for Rs. 1,02,400/-. The complainant deposited the said cheque in his bank on the same day. The cheque was returned unpaid on account of insufficient funds. The said cheque is at Exhibit P.W.1/A and Exhibit P.W.1/B Colly are the Memos of the bank returning the cheque. The complainant, thereafter, issued a notice at Exhibit P.W.1/C. In the cross-examination P.W.1 Floyd has admitted that he knows

one Raison Almeida, who is his friend. He knows the accused from January 2001 as she was introduced by one Shaik Shiraj at his house. The accused is having a spare part shop. He states that he is a partner in a cable operating business and earns about Rs. 30,000/- a month. He further admits that he paid the amount of Rs. 1,65,000/- in cash. The said amount was lying with him, which was part of the collection from his customers. The complainant has further admitted that the loan was advanced by him to the accused at the request of one Shaik Shiraj. The said Shaik Shiraj is presently abroad. He denies that he knows one Prashant Naik, who works as a commission agent in the loan transactions. He denied the suggestion that the cheque in question comprise of two cheques given to Raison Almeida for obtaining loan from Prashant Naik. He has admitted that the accused had lodged a police complaint in respect of threats given by him. He states that he too had lodged a complaint against the accused. He has further stated that the husband of the accused was present at the time of advancing the loan to the accused.

8. In the further cross-examination he has admitted that said Raison Almeida had come to the Court alongwith him on that day. He has further admitted as true that most of the times Raison Almeida accompanies him. He has further admitted that he had advanced loan

to the accused without obtaining any receipt. He has admitted not to have visited the house of the accused alongwith said Raison Almeida. He has admitted that the accused is working in the Goa Tourism and Development Corporation. He has further stated that when the cheque was given to him, it was already typed. He has admitted that when his deposition was being recorded, Raison Almeida was sitting in the Court. He has admitted that it was about 11.30 a.m. when the money was paid by him to the accused at his residence. He has also admitted that the date is not clear on the cheque Exhibit P.W.1/A.

9. P.W.2 P.V. Kosambe is the Senior Branch Manager of Bank of Baroda, in which bank P.W.1 Floyd had his account. He states that the cheque was returned unpaid by the Bank on which it was drawn on account of insufficient funds.

10. P.W.3 D. Ravishankar is the Deputy Manager of the Bank of India, Margao, where the accused had an account. He has admitted that instructions had been received for stopping payment of the cheque prior to the deposit of the cheque. In the cross-examination he has admitted that a letter, dated 28th January 2002, containing a request for stopping payment on the said cheque was received by the Bank.

11. The accused examined herself as a witness and stated that she knows the complainant as she was introduced by one Raison Almeida. Mr. Raison Almeida brought the complainant to her house on the pretext of supplying dish antenna. She states that Raison Almeida is a money lender and she had paid him on numerous occasions by cheques. On the basis of Exhibit C-20 she states about the two entries in respect of payment to Raison Almeida. She states that she had paid an amount of Rs. 2,50,000/- on 22nd June 2000 to Raison Almeida being the proceeds of part consideration of the sale of immovable property. She was expecting the balance payment and Raison Almeida was aware about it. He began pestering her for payment accompanied by the complainant. Succumbing to his persuasion, she decided to give him a cheque though she did not receive the balance amount of consideration. Raison persuaded her to give blank cheques. The accused, therefore, handed over two blank cheques to Raison Almeida bearing Nos. 768312 and 768313. The said cheques were handed over some time in the last week of December 2001. Soon thereafter Raison Almeida started telephoning her for instructions to deposit the said cheques. She informed Raison Almeida that she had yet to receive the balance consideration. In the first week of January 2002, the said Raison Almeida and the complainant had come to her residence and wanted to know as to when the cheques

should be deposited. The accused informed him that she had not received the balance payment and informed the complainant that it was the accused who was obliging Raison by giving him the money. The complainant is alleged to have threatened the accused. The accused has further deposed that she had informed the bank for stopping payment. She has also stated that she had not gone to the house of the complainant for handing over the cheques. She has pleaded alibi as she was working in the office. She has further stated that she invariable issues cheques in her handwriting and never a typed cheque. In the cross-examination certain contradictions are brought out vis-a-vis the suggestion made to the complainant P.W.1. She has admitted as true that complainant used to telephone her regarding the said cheques many times. She has admitted as true that inspite of threats nothing would go wrong because of the assurance given by Raison.

12. The learned trial Court after the evidence of the parties in paragraph 15 of the Judgment doubted the case of the complainant at the very threshold that he would advance loan of Rs. 1,65,000/- without obtaining any receipt and to a person with whom he had no previous acquaintance. The learned trial Court felt that no prudent person would advance loan to a person merely on being introduced by somebody. The learned trial Court

also in paragraph 16 of the Judgment had observed that the complainant had failed to prove that the accused had a spare part shop, for which purpose ostensibly the accused had requested for loan. The learned trial Court then accepted the plea of alibi that the accused was in the office on the relevant date. The learned trial Court then took into consideration the fact that the accused in January itself had issued stop payment instructions to her Bankers in respect of the cheques. Whereas, according to P.W.1 complainant, the cheque had been handed over by the accused to him on 6th February 2002 and had presented the cheque for payment on the same day. In the light of this, the learned trial Court held that the accused had been successful in rebutting the presumption and dismissed the complaint filed by the complainant.

13. A grievance is made by the appellant that the accused has not examined Raison, who is a material witness. A grievance is also made by the appellant that the accused has not been able to establish her alibi and her conduct in not lodging a complaint to the police regarding the threats, renders her version extremely doubtful. A strong pointer in favour of the accused is that even before the cheque was given to the complainant, the accused had issued instructions for stop payment. The said cheque is typed, containing only

the signature of the accused in her handwriting. The accused has, therefore, probabilised her defence that she had given the two cheques to Raison Almeida. Now, admittedly, Raison Almeida is a close friend of the complainant as is evidenced from the evidence of the complainant. In such circumstances, non-examination of Raison Almeida would not adversely affect the defence of the accused. Assuming that the accused has not been able to establish her alibi, the fact remains that the complainant is alleged to have advanced a huge amount of Rs. 1,65,000/- without obtaining a receipt and the fact that the accused had issued instructions for stopping payment even before the cheque is alleged to have been handed over by the accused to the complainant, renders the case of the complainant extremely doubtful. Merely because the accused had not complained to the police is no ground for disbelieving her, particularly when she has admitted in the cross-examination that she felt that nothing untoward would happen in view of the assurance given by Raison Almeida. Therefore, according to me, the learned trial Court was absolutely correct in holding that the accused was able to rebut the presumption.

14. This is an appeal against acquittal and the view taken by the learned trial Court is a possible view taken on the basis of the evidence on record and I do

not see any perversity in the reasoning of the learned trial Court to warrant any interference in this appeal. The appeal is, therefore, sans merit and the same is dismissed.

(P.V. HARDAS)
JUDGE.

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